Appendix.

Appendix

(a) THE ENGLISH LAW.

The general rule extracted from many English authorities is stated in the following language:

> "The rule requiring a ship to keep her course and speed must be observed strictly. So long as there is a possibility of the other ship clearing her, she must stand on."
>
> (*Marsden, Collisions* 8th ed., 386.)

> "To be held to blame for not departing from a rule, the circumstances must be such that to a man of ordinary skill and intelligence it must have been *perfectly clear, almost a certainty,* that adhering to the rule would cause a collision."
>
> (*Marsden,* p. 11.)

In *The Gulf of Suez,* 15 Asp. 328 (Ct. of App. 1921), Lord Sterndale, M. R., says (p. 333):

> "* * * I think it is very important that no rule should be laid down by the court which would throw any burden or give any encouragement to the stand-on ship to alter her course or to act in any way before she is absolutely obliged to do so. The statement of the rule in Mr. Marsden's book seems to be quite correct. 'This rule is perhaps the most difficult of all the regulations for seamen to adhere to. It must always be a matter of difficulty for the officer in charge of the vessel which has to keep her course and speed to determine when the time has arrived to take action, for if he acts too soon, he may disconcert any action which the other vessel may be about to take to avoid his vessel, and be blamed for so doing, and yet the time may come when he must take action. The precise point when he should

> cease to keep his course and speed is difficult to determine, and some latitude is allowed him in determining this'—those last words are taken from the judgment of Lord Gorell in The Albano * * * —'*and when it is shown that he was carefully watching the other vessel and endeavoring to do his best to act at the right moment, he will not be held to blame, though it afterwards appears that he waited too long or acted too soon.*' Those words are taken from the judgments in The Huntsmen (104 L. T. Rep. 464; 11 Asp. Mar. Law Cas. 606) and The Ranza (79 L. J. P. 21n)."

In *The Orduna,* 14 Asp. 574 (Ct. of App. 1919), the hold-on vessel changed her course by starboarding when the vessels were about five hundred yards apart, and before they were in the agony of collision; she was held to blame for this action in the admiralty division. The Court of Appeal affirmed this decision.

The facts of the case are very similar to those in the instant case. The navigating officer of the hold-on steamer, the Orduna, testified:

> "'When the *Konakry* was about a quarter of a point on the starboard bow and distant about a quarter of a mile off, I ordered the helm to be starboarded ten degrees, and immediately afterwards, as the ships were closing rapidly, I ordered hard-a-starboard. * * * My reason for giving the order to starboard was that it was clear that the other ship was passing onto my starboard side, and I starboarded to give her a wider clearance.'"
>
> (14 Asp. 576.)

On these facts Bankes, L. J., said:

> "He acted * * *, because *he considered* that he was justified in assuming that the Konakry, which was breaking, and had broken, the regulations, *was continuing on her course, and would*

not alter so as to avoid risk of collision. She was not fully clear, and was still a crossing vessel; and partly by failing up to that time to get out of the way, and partly because, when she was so nearly across, she had *failed to give any indication by a signal* that she was about to take action under her port helm, he *assumed* that he was justified in considering * * * that she *would* continue her course without taking action, and that he therefore was entitled to starboard his helm in order to give the vessel a wider berth. * * * This second officer's case is that the Konakry had *allowed the time for acting to go by,* and that he was, under those circumstances, justified in taking the course he took. I think there may be such cases, but I agree entirely with what counsel for the respondent said as to the *importance of adhering to the strict observation of the regulations.* I think such a case ought to be scrutinized with the very greatest care. A somewhat similar case was suggested to exist in *The Norman Monarch* * * * and no member of the House of Lords accepted the proposition that the other vessel in that case, the *Phrygia,* was in such a position. The Lord Chancellor, it was quite true, suggested that, *if* the Norman Monarch had been exactly ahead of the Phrygia, she might possibly have been justified in starboarding her helm, having regard to the fact that the Norman Monarch had given no indication she was about to port; but he only suggested it was a possibility, and the view of Lord Phillimore suggests that *it would be dangerous to accept the position,* as he expresses it, that the officer of the Phrygia *thought* that the Norman Monarch *would* draw ahead in a few seconds." (14 Asp. 576.)

Scrutton, L. J., said:

"I entirely agree, and wish to emphasize, if it is necessary, the importance of these rules being strictly observed. The position of ships crossing with a risk of collision is difficult. It has been

thought right to tell one of the ships to keep her course and speed, and the other ship to keep out of the way. The give-way ship can act with much greater certainty if she knows that the stand-on ship is going to do exactly what she is doing when seen, if the stand-on ship acts too soon, she may easily put the give-way ship in a great difficulty; and, *hard as it is, she ought to keep her course and speed until the last possible moment.* * * * * * * if the courses are crossing, but the ships have not yet crossed, and *if although the give-way ship has not yet acted, she can act and pass under the stern by her own action alone, the stand-on ship is in a position in which she ought to stand on.*"

(14 Asp. 577.)

In *The Byfoged Christenson,* 4 App. Cas. 699, 4 Asp. 201 (Priv. Co. 1879), there is an instructive discussion as to the scope of discretion which should be left to masters of vessels, regarding obeying and departing from the sailing rules. While the case is one of collision between sailing vessels on crossing courses, the principles apply to the instant case. The Privy Council said:

"The question raised by the cross appeal arises upon the finding of the learned judge that both vessels were to blame, on the ground that, although the duty of keeping out of the way lay upon the Christensen, those on board the William Frederick, when they found that the other vessel was not going to perform its duty, ought not to have pertinaciously adhered to the 18th rule of the road by keeping on their course, but should have adopted some manoeuvre in order to avoid the collision which afterwards took place. The learned judge in so deciding relied on the case of The Commerce (3 W. Rob. 287) before Dr.

Lushington. Their Lordships desire to remark that, though the principle involved in that case may be in itself a sound one, it is one which should be applied very cautiously, and only where the circumstances are clearly exceptional. *They conceive that to leave to masters of vessels a discretion as to obeying or departing from the sailing rules is dangerous to the public; and that to require them to exercise such discretion, except in a very clear case of necessity, is hard upon the masters themselves, inasmuch as the slightest departure from these rules is almost invariably relied upon as constituting a case of at least contributory negligence.* In the present case their Lordships think that the principle of the decision in the case of The Commerce is not applicable. There is no *constat* at what particular time the master of the William Frederick ought to have come to so distinct a conclusion that the other vessel was not about to obey the rule as to justify his departure from what was his prima facie duty."

(4 Asp. 202.)

(b) CASES CITED IN LOWER COURTS EPITOMIZED AND CLASSIFIED.

First Class: Hold-on Vessel Condemned for Changing Course and Speed.

1. *The Britannia,* 153 U. S. 130. Hold-on steamer ported, stopped and reversed.

2. *The Northfield,* 154 U. S. 629. Hold-on tug ported and stopped.

3. *The Coamo,* 280 Fed. 282 (C. C. A. 2.) Hold-on steamer starboarded. "Would by holding her course and speed have passed in perfect safety across the Essex' bow." (284)

4. *The John H. Starin,* 162 Fed. 146 (C. C. A. 2). Hold-on steamer changed course. Give-way vessel indicated by whistles that she wished to cross ahead of the other.

5. *The Norfolk,* 297 Fed. 251. Hold-on steamer changed speed.

6. *The Southern,* 224 Fed. 210, aff. 235 Fed. 78 (C. C. A. 4). Hold-on launch changed course to starboard.

7. *The Straits of Dover,* 120 Fed. 900 (C. C. A. 4). Hold-on steamer ported, stopped and reversed.

8. *The Umbria,* 153 Fed. 851 (C. C. A. 2). Hold-on steamer starboarded.

9. *The West Hartland,* 2 Fed. (2d) 834 (C. C. A. 9). Hold-on steamer reversed her engines.

10. *The Wm. E. Gladwish,* 206 Fed. 901 (C. C. A. 2). Hold-on tug ported.

11. *Yang-Tse Ins. Ass'n. v. Furness, Withy & Co.,* 215 Fed. 859 (C. C. A. 2). Hold-on steamer ported.

Second Class: Hold-on Vessel Upheld for Maintaining Course and Speed.

12. *The Delaware,* 161 U. S. 459, 469: "It was her (give-way steamer) plain duty to apprise the tug (hold-on vessel) * * * either by blowing the starboard *signal* of two whistles, or an alarm whistle, to *indicate* that the circumstances were such as to render it impossible for her to fulfill her obligation to keep out of the way of the tug. If she had done so a different question would have been presented. *Until the last moment* the tug had a right to assume that she would

comply with the rule. Had the tug stopped and reversed, she might * * * have brought about a collision with the Delaware. * * * In any event there is too much doubt about the fault of the Talisman to justify us in apportioning the damages."

13. *The Nacoochee,* 137 U. S. 330, 340. "Even if it was error of judgment in the schooner to hold her course, it was not a fault, being an act resolved upon in extremis, a *compliance with the statute,* and a manoeuvre produced by the fault of the steamer."

14. *The Binghampton,* 271 Fed. 69 (C. C. A. 2). The District Court held the hold-on vessel liable, because "She stubbornly held her course into collision." (p. 70.) The Circuit Court of Appeals discharged the hold-on vessel from all liability under the rule of *The Delaware,* (supra). The hold-on vessel had *no indication* that the give-way vessel was not going to abide by the rule *other than non-change of course.*

15. *The Chicago,* 125 Fed. 712, 718 (C. C. A. 2). "There is evidence that, under reversed engines and a hard astarboard wheel, such a boat (the give-way steamer) could change direction * * * without forereaching more than a length and a half. We are of the opinion that it was not fault on the part of the Augusta to hold her course and speed so long as that possibility existed, in the absence of some *definite intimation by signal or action* that the Chicago was going to fail in her duty."

16. *The Cygnus,* 142 Fed. 85, 88 (C. C. A. 2). The district judge held the hold-on vessel in fault solely because she did not stop and reverse. The Circuit

Court of Appeals reversed this decision, finding the give-way vessel solely in fault, saying:

> "The Dimock was in the situation in which so many other privileged vessels have been put by gross disregard of the obligation laid upon a burdened vessel; where one cannot tell at what moment of time the other vessel will conform to the rules, and where an effort to save catastrophe by altering course or changing speed may coincide precisely in time with some change by the other boat, and thus precipitate the disaster, instead of avoiding it. We have recently considered this subject in The City of Augusta and The Chicago * * *, where the situation was in some respects similar to the one at bar, and called attention to the forcible exposition of the duty of the privileged vessel which is found in * * * The Delaware * * * where the Talisman was held free from fault, although she twice sounded signal blasts and then an alarm, none of which were answered, but did not change her helm or reduce her speed before collision."

17. *The Devaux Powell,* 165 Fed. 634, 635 (C. C. A. 2). The give-way vessel failed to answer the signals of the hold-on vessel twice; the district judge held it liable, because it

> "knew of the continued inattention or misapprehension of the pilot of the tug, as the vessels converged over a considerable distance on crossing courses, and yet kept on his way to the menaced collision."

Reversed by the Circuit Court of Appeals.

18. *The Haida,* 191 Fed. 623; aff. 196 Fed. 1005 (C. C. A. 2). The hold-on vessel could not, until it was too late to avoid the collision, with certainty know

that the other vessel would not change her course, as she might have done and as it was her duty to do. *Held:* Hold-on vessel not chargeable with fault because she kept her course and speed.

19. *L. Boyers Sons Co. v. U. S.*, 195 Fed. 490, 491 (C. C. A. 2). Hold-on vessel entitled to assume that other vessel will conform to rules of navigation and was not at fault although she "did not starboard when she *saw* that the Cactus (give-way vessel) intended to keep on". The fact that the burdened vessel at first proposed to exchange rights of way, which proposal was rejected, is not a "distinct indication".

20. *The Musconectung,* 255 Fed. 675, 676 (C. C. A. 2). The District Court held the hold-on vessel at fault for failing to reverse or slacken speed immediately after blowing an alarm signal. The Circuit Court of Appeals reversed this decree, holding the vessel not at fault. The give-way vessel proposed to the hold-on vessel by signal that the latter give way; the latter by signal declined. Held: The hold-on vessel had a right to assume that thereupon the give-way vessel would navigate in conformity with the rule. "She was justified in letting some time elapse, in order to ascertain whether the Hercules would continue on or would port her helm, and during this lapse of time she conformed to the law in keeping her speed and course, even though the subsequent events proved that stopping and backing would have been better * * * the privileged vessel should not be too quick in assuming that the burdened vessel is not going to yield to it, although its behavior may be erratic."

N. B. This case shows that indication by give-way vessel that she proposes not to give way, followed by indication by hold-on vessel that she does not consent to the proposal, is equivalent to an absence of distinct indication.

Third Class: Hold-on Vessel Excused for Changing Course and Speed.

21. *The Charles A. Campbell,* 142 Fed. 996 (D. C. Mass.). The red light of the give-way vessel continued to approach and to bear more nearly ahead and finally appeared almost directly ahead ("close under her bow"). This was properly held a distinct indication that the give-way vessel was heading across the bow of the hold-on vessel when the latter changed her course, *in extremis.* The court held that the hold-on vessel was not in fault.

22. *The Montauk,* 180 Fed. 697, 699 (C. C. A. 2). Held: Failure of the hold-on vessel to hold course and speed "was not a fault, but an error *in extremis,* when the collision owing to the gross fault of the Montauk was imminent." The give-way vessel *three times blew signals of two whistles,* indicating her intention not to keep out of the way.

23. *The Queen Elizabeth,* 122 Fed. 406, 409 (C. C. A 2). The hold-on vessel ported *in extremis.* Held: Not a fault, even though unwise.

> "Knowing that his was the privileged vessel he held his course in the expectation that the Birdsall would make some effort to keep out of the way. He ported only *at the last moment* when it was apparent that the Birdsall was doing nothing and *when a collision seemed certain* * * *

the time was too short for accurate calculations or cool and deliberate action."

24. *The Shawmut,* 261 Fed. 616, 621-3 (D. C. Pennsylvania). Collision between steamer (give-way) and sailing schooner (hold-on). The schooner held steady on her course, but put her helm to starboard when "the steamer was so close that a collision was inevitable in order to ease the shock". In this "it may be that the schooner used bad judgment"; but "the judgment exercised was under the evidence a hasty judgment, forced upon the schooner by the steamer". *Held:* "The schooner was without blame for the collision, * * * the *error of judgment* in putting her helm to port, instead of holding her course, being the result of a sudden impulse itself resulting from the negligence of the steamer."

25. *The Transfer No. 15,* 145 Fed. 503, 504 (C. C. A. 2). A tug and steamship met on crossing courses; the hold-on steamship stopped and reversed. Held: The tug "was clearly in fault for proceeding to cross the bows of the steamer without first having, while at a safe distance, obtained the latter's assent to such navigation. The persistent advance of the tug beyond the safety limit, *sounding signals which indicated an intention to continue such advance,* was a sufficient indication to the privileged vessel to warrant her in stopping and reversing".

26. *The Zampa,* 113 Fed. 541 (N. D. Cal.). Two sailing vessels. There was no imperative duty on one to keep her course, but only a qualified duty. The green light of one schooner had almost moved across

the path of the other, when the other *"changed her course at the last moment"*. (Page 543.) The collision was then unavoidable by the burdened vessel alone. Action was *in extremis.*

Fourth Class: Hold-on Vessel at Fault for Keeping Course and Speed.

27. *The Gladys,* 144 Fed. 653, 657 (C. C. A. 2). The give-way vessel was a tug with three barges in tow, the whole 4000 feet long. The hold-on vessel was a schooner. The tug crossed the course of the schooner, and *the first barge had passed 500 feet* before the schooner made a change. The schooner collided with the second barge. *Held:* The schooner saw the tug and tow for an hour and a half before the collision and had notice of the intention of the tug to hold her course, and did not act when disaster "could be avoided *only* by the prompt intelligent action of the schooner. * * * That the tug with her tow, four-fifths of a mile in length, could cross ahead of her was, of course, an impossibility. * * * If, the moment she saw the tug, she had gone off to starboard, she would certainly have escaped. * * * She had plenty of time to prevent a collision after it was evident that *she alone could prevent it"*. (In this case the last moment when the give-way vessel could have prevented the collision was past. In the instant case the last moment when the "Newport" could save the situation was *later* than the moment when the "Svea" blew her second alarm signal.)

28. *The Senator Rice,* 223 Fed. 524 (C. C. A. 2.) The give-way vessel, a tug with a scow in tow, *blew*

two blasts, indicating that she would continue on her course and cross the bows of the hold-on vessel. The latter answered with one blast, indicating that she dissented. The hold-on vessel collided with the scow in tow of the give-way vessel, after the latter had crossed her bow. *Held:* Both at fault, the hold-on vessel on the ground that she should have stopped *after receiving the two blasts.* The distinction between this and the instant case is, that the signal given to the hold-on vessel was a *distinct indication.*

29. *The Tenadores,* 298 Fed. 740 (C. C. A. 2). The two ships were close together when they first saw each other. The give-way steamer *gave distinct indication* that she did not intend to keep out of the way *by blowing two blasts,* the notice meaning: "Get out of my way, or I'll run you down." (742.) In that instant "nothing but instant acquiescence on Murillo's (hold-on vessel) part could avoid collision * * * with her slow speed and full power, she could have avoided collision by yielding right of way to the other vessel" (742); but Murillo gave a cross signal and continued her course and speed. *Held:* Murillo was also at fault.

30. *The New York,* 175 U. S. 187. The hold-on steamer ("New York") *"was advised by signals* * * * that the Connemaugh was about to navigate so as to involve risk of collision, should the New York keep her course and speed". (125 Fed. 717.) She was also advised by seeing the white light of the other steamer. She was held at fault for these and other reasons, the principal one being that "her officers failed conspicuously to see what they ought to have

seen or to hear what they ought to have heard". (Defective lookout.) This case is not governed by Article 21, but by the old rule.

31. *The Albert Dumois,* 177 U. S. 240, was a case of "vessels meeting end on, or nearly so; and a *change of course* of the Dumois, evidenced by the *shifting of lights,* was observable to the Argo, and *notice to her* that the former was not going to starboard, but, on the contrary, was swinging to port across her bows". (125 Fed. 718.)

The following cases cited by respondents are not relevant:

The Admiral Watson, 266 Fed. 122 (D. C. Wash.), is not a case of vessels meeting on crossing courses, but a "narrow channel" case where the course of the approaching vessel was "uncertain or in doubt", and a local pilot rule prescribed that the "vessel in doubt" shall give a danger signal. She gave no danger signal and was held in fault on that ground.

The Devonian, 110 Fed. 588 (D. C. Mass.), is a case where the hold-on vessel was condemned for *failure to keep a lookout.* The remarks of the court relative to her duty to keep her course are obiter. Furthermore, they are addressed to a peculiar situation, in a crowded harbor, where the holding of her course, by a sailing vessel, is almost a prima facie fault.

The George S. Tice, 287 Fed. 127 (C. C. A. 2), is not a case of crossing vessels, but a narrow channel case with special features. Indeed, the Circuit Court of Appeals for the Second Circuit has applied the *Delaware* rule correctly in so many cases that it would

be surprising to find one case in which it could have gone astray.

The Jason, 288 Fed. 57 (D. C. N. Y.), is not a case of crossing vessels, nor dealing with the duty of any vessel to keep her course and speed.

Nautik v. Oostvorne, 6 Lloyd's List 110, is not a case of crossing, but of overtaking vessels. It involves no duty of either vessel to avoid the other, or to keep course and speed.